TEEJAY MARKETING PTE. LTD.

v.

BESCOMAL ENTERPRISE SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 4378 OF 1984]
11 JANUARY 1986

CIVIL PROCEDURE: *Judgment in default of appearance - Writ of seizure and sale - Stay of execution - Regularity of judgment - Reliance on affidavit.*

On 17 December 1984, judgment in default of appearance was entered against the defendants in the sum of S$52,570.44 and interest calculated at $29,273.88. On 29 March 1985, a writ of seizure and sale was issued against the defendants. On 25 April 1985, the Bailiff of the Court seized goods at the defendants factory and office. Two days later, the defendants paid into Court under protest the $105,000 which was the amount due on the judgment. The seizure of the goods was then lifted.

On 30 April 1985, the defendants filed an application by way of summons-in-chambers seeking *inter alia*, for,

(i) a declaration that the writ of seizure and sale was wrongly imposed on the defendants and that consequential thereto there be an assessment of damages suffered by the defendants by the "wrong imposition",

(ii) a declaration that the payment into Court of the $105,000 be refunded to the defendants,

(iii) A stay of execution of 17 December 1984 judgment and

(iv) the Court to approve a proper scheme of settlement of the judgment debt by reasonable periodic payments.

The defendants informed the Court that they would be proceeding against the plaintiffs by way of a fresh action and all that the defendants wanted at this stage was a stay of all further steps in the execution proceedings pending the filing and disposal of the said fresh action. The plaintiffs opposed the application even for a stay.

Held:

[1] In the face of a regular judgment that has not been set aside the complaint about the interest charged is not relevant.

[2] After examining all the relevant affidavits it was found that no reliance could be placed on the defendants' affidavits. In all the circumstances the contention of the defendants that the plaintiffs had agreed to stay execution of the judgment was highly improbable.

[Application dismissed in costs.]

JUDGMENT

VC George J:

On the 17 December 1984 judgment in default of appearance was entered against the defendants in the sum of Singapore $52,570.44 and in the further sum of Singapore $29,273.88 which apparently was interest charged on the defendants calculated up to 30 June 1984 together with further interest at 1% per mensem on the former amount calculated from the 1

July 1984 to date of judgment and thereafter at 8% per annum until realisation. $225 costs was also ordered. The regularity of the judgment is not disputed. It has not been set aside. No application to do so has been filed.

At the instance of the plaintiffs, on 29 March 1985, a writ of seizure and sale was issued pursuant to which on 25 April 1985 the Bailiff of the Court seized goods at the defendants' factory and office. On 27 April 1985 the defendants paid into Court under protest the $105,000 which was the aggregate of what was due on the judgment and they thereby had the seizure of the goods lifted.

On 30 April 1985 the defendants filed their application encl. (9) by way of summons-in-chambers seeking *inter alia* for a declaration that the writ of seizure and sale was "wrongly imposed on the defendants" and that consequential thereto there be an assessment of damages suffered by the defendants by the "wrongful imposition" and that the payment into Court of the $105,000 be refunded to the defendants. The defendants further asked for a stay of execution of the judgment of 17 December 1984 and for the Court to approve "a proper scheme of settlement of the Judgment debt herein by reasonable periodic payments".

On my querying the propriety of the proceedings adopted, Counsel for the defendants/applicants informed the Court that the defendants would be proceeding against the plaintiffs by way of a fresh action (the writ to be filed within 2 weeks) and that in the meantime all that the defendants wanted at this stage was a stay of all further steps in the execution proceedings pending the filing and disposal of the said fresh action. Counsel for the plaintiffs/respondents opposed the application even for a stay.

The Managing Director of the defendant company, one See Toh Chong by affidavit filed in purported support of the application stated that on or about the beginning of April 1985 the defendants' Sales Manager had assured him that execution proceedings would not be instituted if the debt was paid by instalments a scheme for which he stated was to be drawn up by both parties. He went on to state that he provided consideration for the forbearance to sue in the sum of $5,000 and that he had paid $2,000 "sometime in April 1985" towards the judgment debt. See also complained of the interest that the plaintiffs had charged and for which they had obtained judgment and he also wondered whether the plaintiffs being a Singapore company had obtained foreign exchange clearance.

In the face of a regular judgment that has not been set aside the complaint about the interest charged is not relevant.

The Managing Director of the plaintiff company Ko Tiong Hai filed an affidavit in reply. He disposed of the foreign exchange point by producing the relevant letter of clearance. He then denied that there had been negotiations for the judgment debt to be paid in instalments. He denied that the plaintiffs had promised not to proceed to execution. He admitted that $7,000 had been paid but demonstrated that that was in respect of interest charged for late payment in respect of goods sold that were not the subject of this suit. The relevant invoice numbers were shown to be different from the invoice numbers set out in the statement of claim. Ko pointed out that the plaintiffs had given the defendants some 5 years to pay up in that the writ filed in November 1984 was for payment for goods sold in 1979. He argued that having obtained judgment worth some $100,000 and having actually commenced execution proceedings in March 1985 the plaintiffs had not and were unlikely to have accepted a comparatively small amount of $7,000 and "a vague promise to negotiate" settlement of the balance by instalments.

The affidavits of See Toh Chong on which the defendants rely show that he was not particularly concerned about being accurate in what he stated therein. Having in his first affidavit given the impression that $5,000 was paid in consideration of his forbearance to sue and that the plaintiffs had agreed to accept the judgment debt in instalments pursuant to which $2,000 in cash was paid towards the judgment debt, in reply to Ko's affidavit he conceded that the $2,000 was in fact paid even before the plaintiffs had resorted to Court action! He then went on to confuse the position even further by saying that the whole of the $7,000 was paid towards reducing the amount owing which contradicts the earlier stand taken that $5,000 was paid on the consideration for an agreement to forbear to sue. In para. 6 of his affidavit in reply See says in April 1985 the plaintiffs had agreed not to execute on the judgment "for the consideration of $5,000 coupled with the long-standing business and friendly relationship of the plaintiffs', Managing Director Ko Tiong Hai and myself .....". However, in that same affidavit at para. 5, See contradicted himself by conceding that while he and Ko had been on very friendly terms for many years since February 1985 they had "however had a falling out ..... and relations have since been strained".

I came to the conclusion that no reliance could be placed on See's affidavits. I was satisfied that the $7,000 was in respect of a different account. In all the circumstances I found See Toh Chong's contention that the plaintiffs had agreed to stay execution of the judgment highly improbable.

The application was dismissed with costs. I also made an order for the payment out of the money that had been paid into Court by the defendants.

Also found at [1986] 1 CLJ 525